88-73

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

BEN FARRELL KIRK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the appropriate standard for reviewing the denial of an indigent defendant's request for transcripts under **Britt v. North Carolina**, 404 U.S. 226 (1971), requires reversal of the conviction unless the defendant had an adequate alternative to the missing transcript at his subsequent trial.

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioner, Ben Farrell Kirk, requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in **United States v. Ben Farrell Kirk.**

OPINION BELOW

The Opinion of the Court of Appeals affirmed the conviction and sentence of Petitioner and is officially reported at 844 F.2d 660 (9th Cir. 1988). A copy of the Opinion is attached as Appendix A.

STATEMENT OF JURISDICTION

On 14 May 1988, the Court of Appeals entered judgment affirming the conviction of the Petitioner for conspiracy, multiple counts of mail fraud, wire fraud, interstate transportation of stolen property, and a RICO charge. On 14 June 1988 his petition

for rehearing and suggestion for rehearing en banc was denied (Appendix B). This Court's jurisdiction to review the judgement of the Court of Appeals is conferred by 28 U.S.C. 1254(1).

FEDERAL RULES INVOLVED

Constitution of the United States of America
14th Amendment - Equal Protection

STATEMENT OF THE CASE

The defendant was charged and convicted of multiple counts of conspiracy, RICO, mail fraud, wire fraud and interstate transportation of stolen goods.

SUPPLEMENTAL STATEMENT OF THE FACTS

On 11 March 1986, petitioner's first trial commenced. On 26 March 1986, after ten days of trial, petitioner (along with two of his co-defendants) was severed from that trial and a mistrial declared as to those three defendants.

On 8 April 1986 (less that two weeks after petitioner was severed from the first trial), petitioner filed his "Joint Expedited Ex Parte Application for Transcripts and Sealing of Papers," accompanied by a supporting memorandum of points and authorities and a declaration from his attorney.

It was after the severance that three of petitioner's co-defendants (Quincy, Moody and Lindauer) testified. The Clerk's docket entries for petitioner's case do not reflect this testimony, as the "first" trial entries ceased after petitioner was severed. However, the Clerk's docket entries for the remaining defendants in trial # 1 do show that the three above-mentioned co-defendants did testify. Moody and Lindauer were acquitted. Quincy's jury deadlocked.

The trial court completely denied petitioner's application, and a second trial

was held on 21 April 1986. That trial resulted in the acquittal of two more co-defendants (one being petitioner's wife) and a mistrial declared as to the petitioner. Petitioner filed a second Ex Parte Application for Transcripts and Sealing of the Papers on 30 May 1986. The contents of this application presumably repreated the contents of the one filed on 8 April 1986.

In the declaration, petitioner's attorney stated (CT 57: 7(c)), that after petitioner was severed from the trial, he [the attorney] was unable to remain in the courtroom all day, every day, to record subsequent witness statements. Petitioner was not at the trial after severance as he was forced to return to his job in Houston, Texas soon after the severance.

Later in that same declaration, petitioner's attorney informed the court that his decision to call these remaining

co-defendants as defense witnesses depended upon their testimony at the first trial where they were all acquitted.

On June 11, 1986, the trial court granted petitioner partial relief. Petitioner was provided with the testimony of six witnesses who testified in the first trial prior to the severance,[1] and all of the testimony from the second trial. Petitioner was again denied the remaining testimony from his first trial.

Petitioner's third trial began on 30 October 1986. The jury started deliberation on 9 November 1986 and returned guilty verdicts on all counts on 10 November 1986. Petitioner filed a timely notice of appeal

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[1] The Government, in it's Brief to the 9th Circuit stated petitioner received all of the testimony of the witnesses against him in trials # 1 and # 2, in time to prepare for trial # 3. However, the Government failed to discuss petitioner's request for the testimony of his severed co-defendants. Petitioner never received that testimony which was vital to his contemplated defense.

REASONS FOR ALLOWANCE OF THE WRIT

THE LOWER COURT FAILED TO USE THE APPROPRIATE STANDARD FOR REVIEWING THE DENIAL OF THE INDIGENT PETITIONER'S REQUEST FOR TRANSCRIPTS WHICH REQUIRES REVERSAL OF HIS CONVICTION UNLESS THE GOVERNMENT CAN PROVE PETITIONER POSSESSED AN ADEQUATE ALTERNATIVE TO THE MISSING TRANSCRIPTS AT HIS SUBSEQUENT TRIAL.

The Court below correctly stated that petitioner received transcripts of the witnesses who testified against him in his first two trials. However, the Court's Opinion fails to address the other issue in petitioner's appeal -- does he have a right to transcripts of the testimony of his co-defendants in the first trial? All of these individuals testified to their overall lack of intent to defraud consumers, and all were acquitted except one whose jury hung. Counsel for petitioner informed the trial court in his **ex parte** application for transcripts that:

> ". . . whether former co-defendants are subpoenaed is dependant upon

their testimony;" (CR 57:7).

He explained his lack of actual knowledge as to their complete testimony by stating:

> "After the severance of defendant Ben Farrell Kirk in the first trial, I was not able to remain in the courtroom every day, all day for the remainder of the first trial to record witness statements, and my client had to return to his home in Houston, Texas to continue earning a living:" (CR 57:7).

The applicable test for this case was set forth in **Britt v. North Carolina**, 404 U.S. 226, 227 (1971): ". . . there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal."

As to the question of need, it is so apparent that the Supreme Court "has taken judicial notice of the importance of a transcript in a variety of circumstances . . . [and] . . . Most recently in **Long** and **Roberts** the Court simply found it

unnecessary to discuss the question, . . . (id. at 227, n. 3). To make the point even clearer, the Court said:

> "Our cases have consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a showing of need tailored to the facts of the particular case . . . it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to the defendant in at least two ways: as a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution witnesses. (id. at 228).

After Britt, the question for reviewing courts in ruling on improper denials of previous trial transcripts is not the "actual prejudice test" (i.e., was the error harmless beyond a reasonable doubt?), but rather whether the defendant had at trial "adequate alternatives to a transcript" (id. at 228). If not, the error requires

reversal. (id. at 230).[2]

The Circuit court's opinion adopts as its standard in assessing an indigent's denial of a trial transcript the test set forth in **United States v. Rosales-Lopez**, 617 F.2d 1349, 1355 (9th Cir. 1980) affd. o.g. 451 U.S. 182 (1981). But this is a misread of the case. That case involved a request by an indigent for the transcript of a pre-trial suppression hearing. The **Rosales-Lopez** court noted that a "preliminary proceeding" such as a suppression hearing is a different (and less important) tool for the defense -- one in which the courts have ". . . generally shown a greater inclination to examine the actual prejudice to the defendant resulting from the denial of a

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[2] The **Britt** court noted at p. 230, n. 6, one of its cases where it permitted the State a remand of an appeal to allow it to prove the adequate alternative (i.e., could the defendant in that case have borrowed an existing transcript from the prosecutor? See **Wade v. Wilson**, 396 U.S. 282 (1970)).

transcript of a preliminary hearing than . . . the denial of a trial transcript" (id. at 1356).

Nonetheless, the Court of Appeals found the trial court's denial of petitioner's request for trial transcripts harmless beyond a reasonable doubt. The rationale for this ruling was that, one, "overwhelming evidence supports the conviction" (U. S. v. Kirk, supra, 844 F.2d at 663) and two, "After reviewing the transcripts requested by Kirk, it is clear that Kirk was denied no material in this case that would have permitted him to refute the evidence against him (Id.).

To petitioner's knowledge, no transcripts were prepared of the missing portions of the first trial (Trial # 1); thus, if the Court had copies prepared of Trial #1 (the severed trial) petitioner is at a disadvantage in arguing the point. To

petitioner's knowledge, those requested transcripts from Trial #1 have not been prepared and the Court's reference to this presumably is mistaken or refers only to the transcripts of Trial #2 (the mistrial). As petitioner argued at oral argument to the court below, had he had the testimony of the co-defendants in his first trial (who testified after petitioner's severance from Trial #1 that the time-share business was legitimate and were acquitted), he could have used the transcripts as a basis for subpoenaing these former defendants and requiring their similar testimony at his own trial.

Even without the aid of these transcripts, petitioner's jury in the second case (Trial # 2), could not reach a verdict -- certainly evidence that this case was far from overwhelming. And while the Opinion of the Court quotes witness Walter Gribben as

pointing to the troubles of the company just before the arrival of James Quincy, the record shows that Gribben wrote petitioner and said he was four units short on inventory and that he had not maintained adequate mortgage coverage (RT 85). That is why he backed out of a financial arrangement with Kirk's company, but his company continued to provide bookkeeping services for the company (RT 96). Walter McDowell, the original President of WPMK, testified that Gribben recommended James Quincy to Mr. Kirk with praise and that Quincy's hiring was essential to any financing (RT 170, 178).

The trial court recognized that "there's no evidence that Mr. Kirk had any dealings, at all, with these alleged victims. . . ." (RT Oct. 8, 1986, p. 57). The convictions stem in the main from the misrepresentations of the sales staff to customers.

Petitioner's defense was that the sales staff had its own agenda in making such representations against his direction. There was evidence petitioner tried to insure that the sales staff met the requirements of the law (e.g., RT 256, Exhibit 156, memo re giving customers disclosure and rescission statements).

Petitioner mentions this because this case was far from "overwhelming." Thus, even under the harmless error test applied in this case, the decision was erroneous. And petitioner submits that the "actual prejudice" test used has no application in cases such as this.

Although the Circuits are divided on the issue, some have accurately interpreted Britt's holding in the manner petitioner suggests -- that once the denial of a previous trial transcript is found error, the standard of "actual prejudice" is not

the test; the test is whether the State can prove there were adequate alternatives available to the defense at the time of the retrial. See **United States v. Mullen**, 550 F.2d 373, 374 (6th Cir 1977) ("Since Mullen had no equivalent substitute, it was prejudicial error to require him to undergo the second trial without the requested transcript"); **Andrews v. Maher**, 525 F.2d 111, 113 (6th Cir. 1975) (finding a remand for harmless error analysis under the facts of that case to be a "useless gesture"); and see **United States v. Jonas**, 540 F.2d 586 (7th Cir. 1976) (court eschews finding error harmless where government had the prior transcript and the defendant did not).

State court decisions are split on this issue as well, with a substantial majority (20 states) favoring petitioner's interpretation of Britt. Nine states agree with the Court below that the "harmless

error" analysis is applicable. An additional seven states have interpreted of Britt as having an "abuse of discretion" standard, or deciding that under Britt, defendant bears the burden of proving his "need" for the transcript.

The following cases are in agreement with petitioner's interpretation of Britt (i.e., if petitioner requests a transcript and it is denied and there is no acceptable alternative available to him, reversal is warranted):

Alabama	Lindsey v. State, 456 So.2d 383 (Ala.Cr.App., 1983);
California	People v. Hosner, 15 Cal.3d 60 (1975);
Colorado	People v. Sanchez, 622 P.2d 604 (Colo., 1980);
D.C.	Kleinbart v. U.S., 426 A.2d 343 (D.C.App., 1981);
Idaho	State v. Coronado, 98 Idaho 421, 565 P.2d 1378 (1977);
Iowa	State v. Campbell, 215 N.W.2d 227 (Iowa 1974);

Kansas	**State v. Hornbeak**, 221 Kan. 397, 559 P.2d 385 (1977);
Kentucky	**Simmons v. Commonwealth**, 576 S.W.2d 255 (Ky., 1978);
Louisiana	**State v. Petta**, 354 So.2d 563 (La., 1978);
Michigan	**People v. Hampton**, 89 Mich.App. 434, 280 N.W.2d 461 (1979);
Mississippi	**McClendon v. State**, 387 So.2d 112 (Miss., 1980);
Missouri	**State v. Rollie**, 585 S.W.2d 78 (Mo., 1979);
N. Carolina	**State v. Rankin**, 295 S.E.2d 416 (N.C.., 1982);
N.Hampshire	**State v. Shute**, 122 N.H. 501, 446 A.2d 1164 (1982);
N.Mexico	**State v. Romero**, 87 N.M. 279, 532 P.2d 208 (1975);
Ohio	**State v. Arrington**, 42 Ohio St.2d 114, 326 N.E.2d 667 (1975);
Oklahoma	**Morgan v. State**, 497 P.2d 464 (Okla.Cr., 1972);
Tennessee	**State v. Riggins**, 645 S.W.2d 419 (Tenn.Cir.App., 1982);
Texas	**Graham v. State**, 624 S.W.2d 785 (Tex.App., 1981);
Washington	**State v. Woodard**, 26 Wash.App. 735, 617 P.2d 1039 (1980).

The following cases agree with the decision of the Court below that Britt is subject to the "harmless error" analysis:

Arizona[3]	State v. Tomlinson, 121 Ariz. 313, 589 P.2d 1347 (1979);
	State v. Razinha, 123 Ariz. 355, 599 P.2d 808 (1979);
**[4] Colorado	People v. St. John, 668 P.2d 988 (Colo., 1983);
+ Iowa	State v. Campbell, 215 N.W.2d 227 (Iowa, 1974);
Mass.	Commonwealth v. Britt, 362 Mass. 325, 285 N.E.2d 780 (1972);
Maine	State v. Curtis, 399 A.2d 1330 (Me., 1979);
	State v. Goodall, 407 A.2d 268 (Me., 1979);

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[3] The list of cases is a sampling of the variety of decisions and in no way is an exhaustive compilation of the decisions. This disparity in interpretations of **Britt** on the state level alone makes this an issue in need of resolution.

[4]
- * One star denotes a state which appears in two categories
- ** Two stars denotes a state which appears in all three categories
- + Denotes the same case appears in two categories

*Michigan People v. Mock, 108 Mich.App. 390, 310 N.W.2d 393 (1981);

*N.Carolina State v. M'Neill, 33 N.C.App. 317, 235 S.E.2d 274 (1977);

*N.Hampshire State v. Cofske, 129 N.H. 133, 523 A.2d 102 (1987);

** Texas Cook v. State, 611 S.W.2d 83 (Tex.Cr.App. 1981).

The following cases either interpret the Britt standard of review as "abuse of discretion" (A/D) or construe Britt as placing the burden of proof as to "need" on the defendant (B/P).

Arkansas (B/P) Mosby v. State, 489 S.W.2d 799 (Ark.,1973);

**Colorado (B/P) People v. Montoya, 640 P.2d 234 (Colo., 1981);

(A/D) Brewer v. Dist. Ct., 655 P.2d 819 (Colo., 1982);

Georgia (A/D) Powers v. State, 294 S.E.2d 555 (Ga.App. 1982);

(A/D) Chance v. State, 322 S.E.2d 741 (Ga.App. 1984);

*Kansas (A/D) State v. Jordan, 220 Kan. 110, 551 P.2d 773 (1976);

(B/P)		**State v. Coe**, 223 Kan 153, 574 P.2d 929 (1977);
* Mississippi (B/P)		**Ruffin v. State**, 481 So.2d 312 (Miss., 1985);
* Ohio (A/D)		**State v. Jenkins**, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984);
** Texas (A/D)		**Daniels v. State**, 708 S.W.2d 532 (Tex.App.-Dallas 1986).

Applying Britt here, petitioner was denied essential transcripts of the portion of the first trial where exculpatory material from co-defendants was presented in their defense which led to their acquittals. As the Government noted in its brief below, "the balance of the defendants were either acquitted or dismissed pursuant to a judgment of acquittal" (C.R., 160 - 161). (Resp. Brief., p. 2)[5] The Government also

[5] As the Government brief notes, in the tenth day of Trial #1, defendants Kirk, his wife Mary Anne, and Gabriel LaBruzza, were severed from that trial. (Resp. Brief., p. 2.). The balance of the defendants were acquitted. At the second trial, LaBruzza and Mrs. Kirk were acquitted and the jury hung on petitioner's counts (C.R. 160 - 161).

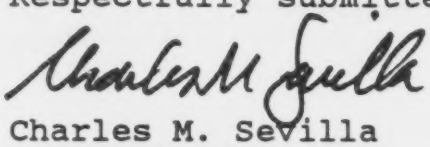
conceded that petitioner did not receive all of the trial record prior to his severance. The transcripts of the first trial not officially provided to petitioner Kirk were primarily transcripts of victim witness testimony (Resp. Brief., p. 5). Also, the Government failed to argue whether any adequate alternatives to the requested transcripts existed.

Whether there were "minor" prosecution witnesses or helpful potential defense witnesses, Britt error exists and, given the lack of any record of an alternative to the transcripts provided to the petitioner, the judgment should be reversed.

CONCLUSION

For the reasons presented, it is requested that the Court grant a hearing to review the issue raised in this petition.

Respectfully submitted,



DATED:

Charles M. Sevilla
Attorney for
Petitioner Kirk

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. BEN FARRELL KIRK, *Defendant-Appellant.*	No. 86-1383 D.C. No. CR-85-1547-ER OPINION

Appeal from the United States District Court
for the District of Hawaii
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
January 11, 1988—San Francisco, California

Filed April 14, 1988

Before: Alfred T. Goodwin, Jerome Farris and
Dorothy W. Nelson, Circuit Judges.

Per Curiam

SUMMARY

Criminal Procedure

Appeal from conviction. The court affirmed holding that the denial of requested transcripts was harmless, admitted statements were not hearsay and a RICO violation was proven.

An indictment charged appellant Kirk and others with conspiracy to defraud in connection with a time share venture.

Evidence shows that the group was overselling time share contracts and testimony reveals that misrepresentations were made in the sale of purchase contracts. After two weeks into the first trial, the court granted Kirk's and two other co-defendants' severance motion. The two co-defendants were acquitted in a separate trial. The jurors deadlocked as to Kirk's culpability and a mistrial was declared. Kirk's third trial resulted in his conviction.

[1] A state must, as a matter of equal protection, provide indigent prisoners with the *basic tools of an adequate defense* or appeal, when those tools are available for a price to other prisoners. However, the right to free transcripts is not absolute. [2] Kirk's request for transcripts from his mistrial was granted. [3] The denial of Kirk's requests for transcripts was harmless beyond a reasonable doubt for two reasons. First, overwhelming evidence supports the conviction. Second, after reviewing the transcripts requested by Kirk, it is clear that Kirk was not denied material that would have permitted him to refute the evidence against him. [4] Further, there is no discrepancy in witness testimony between the trials. [5] The admitted testimony of time share contract purchasers, salespeople, and co-defendants fell within the scope of agency or employment. [6] More importantly, these statements were not hearsay at all, they were admitted to establish that the statement was made or to demonstrate the effect the statement had on the hearer. [7] As to the RICO violation, predicate acts may constitute a pattern of activity under RICO even though only a single scheme is involved. [8] Also, the government has sufficiently alleged the existence of an enterprise.

COUNSEL

Leslie E. Osborne, Jr., Assistant United States Attorney, Honolulu, Hawaii, for the plaintiff-appellee.

Ray A. Findlay, Kailua-Kona, Hawaii, for the defendant-appellant.

OPINION

PER CURIAM:

Ben Farrell Kirk appeals from his conviction on one count of conspiracy, one count of RICO, fifty-six counts of mail fraud, three counts of wire fraud, and two counts of interstate transportation of stolen property. Kirk contends that his conviction should be reversed because (1) the denial of certain trial transcripts violated his right to prepare an adequate defense; (2) the admission of certain testimony violated the hearsay prohibition and his right to confront the witnesses against him; and (3) the government failed to prove sufficiently the RICO charge. The district court had jurisdiction pursuant to 18 U.S.C. § 3231 and we have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the conviction on all counts.

FACTUAL AND PROCEDURAL BACKGROUND

W.P.M.K., a company founded by Kirk and three others in 1979, provided condominiums and apartments for purchase through a "right-to-use" time share club. Members purchased the right to use club condominiums, primarily in Hawaii, for a specified number of weeks. Kirk ran the day-to-day operations while the other three original founders financed the scheme. Because of financial difficulties, Kirk hired James Quincy in 1980 to handle marketing operations. W.P.M.K. acquired the facilities while Quincy's organization serviced the purchasers and maintained the facilities. Quincy contracted to receive 50% of the net sale proceeds of the venture. This arrangement operated until Quincy signed a termination agreement in May of 1981. W.P.M.K. went into bankruptcy in late 1981.

The indictment charged Kirk and nine others with conspiracy to defraud in connection with the time share venture. Two of the ten originally indicted pled guilty and testified for the government. Evidence supports the conclusion that the group was "overselling" time share contracts — e.g., selling consumers eight-year, monthly contracts while only having three-year lease or purchase agreements for the facilities, and obligating the venture to provide 5,270 weeks of use when an inventory of only 3,068 weeks was acquired.

Testimony reveals that misrepresentations were made in the sale of time share purchase contracts. Testimony shows that W.P.M.K. had financial difficulties and the inventory was oversold even before Quincy was part of the venture. Kirk's control over the time share scheme even during Quincy's involvement is supported by testimony. One potential financier for the venture, Walter Gribben, testified that Kirk knew of Quincy's prior problems in such ventures and was warned that the agreement with Quincy would increase W.P.M.K.'s financial difficulties. The financing negotiations with Gribben fell through when Kirk insisted on hiring Quincy for 50% of the sales proceeds. Kirk presented evidence about problems between him and Quincy in 1981 due to purchaser dissatisfaction, and evidence that he insisted on full disclosure to prospective purchasers and quick processing of credit memos.

The first trial began for the remaining eight defendants on March 11, 1986 in Hawaii before the Honorable Jesse W. Curtis ("Trial #1"). After two weeks, the court granted the severance motion of Appellant and two other co-defendants, Mary Anne Kirk and Gabriel LaBruzza. At a separate trial before Judge Curtis in April of 1986, Mary Anne Kirk and Gabriel LaBruzza were acquitted. The jurors were deadlocked as to Appellant's culpability and a mistrial was declared ("Trial #2"). The third trial for Appellant commenced September 30, 1986 before the Honorable Edward

Rafeedie. This eight-day jury trial resulted in Kirk's conviction ("Trial #3"). Kirk timely appealed.

DISCUSSION

I. *KIRK'S TRANSCRIPT REQUESTS*

We review a claim that the denial of a transcript request violated a defendant's constitutional right to prepare an adequate defense de novo. *See United States v. McConney*, 728 F.2d 1195, 1202-04 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). We will not reverse the conviction if the denial was harmless beyond a reasonable doubt. *United States v. Rosales-Lopez*, 617 F.2d 1349, 1355 (9th Cir. 1980) *aff'd*, 451 U.S. 182 (1981).

Kirk contends that the denial of certain transcript requests violated his right to prepare an adequate defense. Kirk requested the full transcripts from (1) Trial #1 - from which he had been severed; (2) Trial #2 - which resulted in a hung jury; and (3) the ongoing trial of James Quincy, a third party charged in the same scheme. The district court granted in part and denied in part the request for Trial #1 transcripts; granted the request for Trial #2 transcripts in full; and denied the request for transcripts of Quincy's trial. Kirk contends that the district court erred in not fully granting all three requests.

[1] The Supreme Court has held that a state "must, as a matter of equal protection, provide indigent prisoners with the *basic tools of an adequate defense* or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971) (emphasis added). However, the right to free transcripts is not absolute. The Court in *Britt* recognized that the "outer limits of that principle are not clear." *Id.*

Kirk maintains that all the transcripts were essential to his defense preparation to refresh witnesses' memories, for

impeachment purposes, and because he was presenting a different defense at his third trial. In *Britt*, the Supreme Court highlighted two factors to consider in determining an indigent defendant's need for transcripts: "(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript." *Id.*

[2] This court considered the denial of a request for transcripts of a preliminary hearing in *United States v. Rosales-Lopez*, 617 F.2d 1349 (9th Cir. 1980). We noted that if a mistrial has occurred, "courts have generally regarded a transcript of the prior trial as a tool 'reasonably necessary' to an effective defense." *Id.* at 1355. Kirk's request for transcripts from his mistrial was granted in full. In *Rosales-Lopez*, this court held that the denial of the defendant's request for a transcript of his suppression hearing was harmless beyond a reasonable doubt. The defendant in *Rosales-Lopez* requested the testimony of two Immigration and Naturalization Service agents at the suppression hearing for impeachment purposes. This court ruled that no harm resulted from the denial of the transcript because of the "overall strong consistency" in the lengthy testimony of the two agents at the suppression hearing and the trial. *Id.* at 1356.

In the only other case addressing the right to free transcripts, this court upheld the denial of a defendant's request for transcripts of a *third party's* trial. *United States v. Bamberger*, 482 F.2d 166 (9th Cir.), *cert. denied*, 414 U.S. 1041 (1973). We noted that defining the scope of a defendant's "constitutional right to a free transcript of testimony at a third party's trial... would require a delineation of those outer limits [declared uncertain by the Supreme Court]." 482 F.2d at 168. In *Bamberger*, this court held that the defendant could effectively cross examine the government's primary witness and that the denial was harmless because other evi-

dence of the defendant's guilt significantly decreased the government's reliance on that witness. *Id.* at 168-69.

[3] As in *Bamberger,* we need not reach the delineation of Kirk's constitutional right to a free transcript because the denial of Kirk's requests for transcripts was harmless beyond a reasonable doubt. *See id.* at 168. The denial was harmless for two reasons. First, overwhelming evidence supports the conviction. Second, after reviewing the transcripts requested by Kirk, it is clear that Kirk was denied no material in this case that would have permitted him to refute the evidence against him.

As in *Bamberger,* other circumstantial evidence of guilt introduced against the defendant supports a determination of harmlessness. *See id.* at 169-70 & n.7. Evidence such as Kirk's correspondence, tapes of his conversations and business meetings, and the time share purchaser sales materials significantly decreased the government's dependence on the credibility of witnesses.

[4] Further, we have found no discrepancy in witness testimony between the trials. *See Rosales-Lopez,* 617 F.2d at 1356 (trivial inconsistencies in testimony will not merit reversal). In reviewing the record, we found only two minor witnesses from Kirk's final trial who had not appeared at his mistrial. The two witnesses offered testimony corroborating that of other consumers who complained about the time share venture.

II. *HEARSAY TESTIMONY*

We review a district court's ruling to admit evidence over a hearsay objection for abuse of discretion. *United States v. Cowley,* 720 F.2d 1037, 1040 (9th Cir. 1983), *cert. denied,* 465 U.S. 1029 (1984).

[5] Kirk contends that the district court erred in admitting hearsay testimony of time share contract purchasers, Para-

dise Palms salespeople, and co-defendants. However, these statements were admissible as nonhearsay statements of agents or employees under Fed. R. Evid. 801(d)(2)(D). Many of the statements cited by Kirk as instances of hearsay were made by agents or employees of Paradise Palms. The statements primarily described the nature and quality of the time share units, and the nature and extent of contractual obligations to prospective time share customers, therefore clearly falling within the scope of agency or employment.

[6] More importantly, the statements Kirk objects to are not hearsay at all. *See* Fed. R. Evid. 801(c). These statements are not offered for the truth of the matter asserted, but were admitted to establish that the statement was made or to demonstrate the effect the statement had on the hearer. *United States v. Anfield*, 539 F.2d 674, 678 (9th Cir. 1976). For example, statements of salespersons misrepresenting the program were admissible to prove that the misrepresentations were made, not to prove the truth of what the salespersons stated. Because the admitted statements were nonhearsay admissions pursuant to Fed. R. Evid. 801(d)(2)(D) and were not hearsay, the district court did not abuse its discretion.

Because the statements were not offered for the truth of the matter asserted, no confrontation clause violaton occurred. *Tennessee v. Street*, 471 U.S. 409, 413-14 (1985); *see also United States v. Miller*, 771 F.2d 1219, 1233 (9th Cir. 1985).

III. *RICO*

We review the denial of Kirk's motion for acquittal in the light most favorable to the government to determine if a rational trier of fact could have found the essential elements of the RICO charge beyond a reasonable doubt. *See United States v. Arriaga-Segura*, 743 F.2d 1434, 1435 (9th Cir. 1984).

Kirk contends that the government failed to prove a violation of RICO because it (1) failed to prove a 'pattern" of rack-

eteering activity and (2) failed to establish an enterprise "separate and apart" from the pattern of activity. Both contentions are without merit.

[7] Kirk argues that the government failed to establish the requisite pattern of racketeering activity under RICO because all of the alleged acts of mail and wire fraud related to a single scheme to defraud, the Paradise Palms venture. This argument is without merit because this circuit recently held that predicate acts may constitute a pattern of activity under RICO even though only a single scheme is involved. *See United Energy Owners Committee, Inc. v. United States Energy Mgt. Sys., Inc.*, 837 F.2d 356, 360-61 (9th Cir. 1988); *Medallion Television Enterprises, Inc. v. SelecTV of California, Inc.*, 833 F.2d 1360, 1363 (9th Cir. 1987); *Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 191-94 (9th Cir. 1987); *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 698,699 (1988).

[8] Kirk also argues that the government failed to establish an enterprise separate and apart from the alleged acts of racketeering activity. The government has sufficiently alleged the existence of an enterprise. Although the circuits are divided on the requirements for proof of an enterprise under *United States v. Turkette*, 452 U.S. 576, 582-83 (1981), under either test, the existence of a corporation fulfills the requirements of an ascertainable structure apart from the predicate racketeering activity. *Bennett v. Berg*, 685 F.2d 1053, 1060-61 (8th Cir. 1982), *adopted upon reh'g en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983); *see United Energy*, 837 F.2d at 361-64. Here, the government presented evidence of several lawful entities existing separately from the racketeering activities, including Paradise Palms Vacation Club, Inc., Paradise Palms Vacation Club Sales, Inc., W.P.M.K., and L.S.Q. Marketing.

Because the government has sufficiently proved a pattern of racketeering activity and an enterprise separate and apart

from the pattern of activity, we affirm Kirk's RICO conviction.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. BEN FARRELL KIRK, Defendant-Appellant.	No. 86-1383 DC No.CR-85-1547-ER ORDER

Before: GOODWIN, FARRIS and NELSON, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

EXHIBIT B

Supreme Court, U.S.
FILED
SEP 9 1988
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(2)

No. 88-73

In the Supreme Court of the United States

OCTOBER TERM, 1988

BEN FARRELL KIRK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed reversible error by not providing petitioner with transcripts of all the testimony in a previous criminal trial that was related to the present case.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 4435-4444) is reported at 844 F.2d 660.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1988. A petition for rehearing was denied on June 14, 1988. The petition for a writ of certiorari was filed on July 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Hawaii, petitioner was convicted on 56 counts of mail fraud (18 U.S.C. 1341), three counts of wire fraud (18 U.S.C. 1343), two counts of interstate

transportation of stolen property (18 U.S.C. 2314), one count of racketeering (18 U.S.C. 1962(c)), and one count of conspiracy (18 U.S.C. 371). He was sentenced to concurrent prison terms of five years on each count and a fine of $76,000.

1. In 1979, petitioner and three others formed a company called W.P.M.K., which sold the right to use vacation homes, primarily in Hawaii. Customers of W.P.M.K. purchased the right to use the housing for a specified number of weeks. Petitioner ran the day-to-day operations of W.P.M.K. while the other founders financed the business. In 1980, petitioner hired James Quincy to handle marketing operations, customer service, and maintenance. Pet. App. 4437.

Acting in concert with others and through W.P.M.K., petitioner engaged in a scheme to oversell time in the vacation homes. Under that scheme, the company sold unwitting consumers the right to use the housing one month a year for eight years. W.P.M.K., however, had only three-year leases or purchase agreements for the same facilities. Thus, W.P.M.K. sold 5,270 weeks of use although it had an inventory of only 3,068 weeks. Pet. App. 4438.

2. Petitioner was indicted along with nine other persons, two of whom later pleaded guilty and testified for the government. Petitioner was involved in three trials. After two weeks of his initial trial, the district court granted petitioner's motion to sever his trial.[1] At petitioner's second trial, the jury could not reach a verdict. Petitioner was convicted at his third trial. Pet. App. 4438-4439.

Prior to the third trial, petitioner, an indigent, requested various transcripts: (1) the entire transcript of the first trial, from which his case was severed; (2) the transcript of

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[1] The cases against two other defendants were also severed (Pet. App. 4438).

his second trial, which did not result in a verdict; and (3) the transcript of a separate, ongoing trial of co-defendant Quincy. The district court provided petitioner with the transcripts of six witnesses who testified at the first trial and the entire transcript of the testimony at the second trial. The court, however, denied the balance of petitioner's request. The court found that "there is no indication that the trial proceedings involving the other nine defendants would be relevant to" petitioner (C.A. App. 103).

3. The court of appeals affirmed. The court of appeals did not decide whether petitioner was entitled to all the transcripts that he sought. Rather, the court held that any error in failing to provide the transcripts "was harmless beyond a reasonable doubt" (Pet. App. 4441). The court's conclusion rested on the "overwhelming evidence" of petitioner's guilt and the court's observation that petitioner "was denied no material in this case that would have permitted him to refute the evidence against him" (*ibid.*).

ARGUMENT

1. Petitioner contends that he should have been given transcripts of the testimony of his co-defendants at the first trial.[2] He argues (Pet. 6-7, 11) that he needed those transcripts to help him decide whether to call those co-defendants as witnesses. That claim is without merit.

The government "must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal." *Britt* v. *North Carolina*, 404 U.S. 226, 227 (1971). The Court in *Britt* identified two factors that are relevant to the deter-

[2] Petitioner does not renew his claim for the transcript of Quincy's trial.

mination of need: "(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript" (*ibid.*).

Here, the district court provided petitioner with all the transcripts that he needed. Four defendants remained in the first trial after the severance; two of those defendants testified, and petitioner was provided with the transcript of the testimony of one of those defendants, James Quincy. It is clear that petitioner did not need the transcript of the testimony of the other defendant in order to decide whether to call him as a witness at petitioner's trial: The strategy of the remaining defendants at the first trial was to shift the blame for any offenses to petitioner; that is why petitioner sought a severance and why the district court granted petitioner's request. Accordingly, petitioner knew without the benefit of any transcript that it was not in his interest to call the defendants at the first trial to testify on his behalf.[3]

2. Petitioner next argues (Pet. 13-19) that the court of appeals erred in using a harmless-error analysis. He contends that no error in failing to provide a needed transcript can be harmless. Petitioner, however, has not preserved that claim. In the court of appeals, petitioner acknowledged (C.A. Br. 11) that such an error may be harmless.

In any event, this Court has never suggested that an error in failing to provide a defendant with transcripts cannot be harmless. And the courts of appeals have consistently applied the harmless-error rule in that context.

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[3] In passing, petitioner also argues (Pet. 20) that the district court erroneously failed to provide him with transcripts of the testimony of certain victims at the first trial. However, each of those victims was called as a witness at the second trial, and petitioner was provided with a full set of the transcripts of that trial.

See, *e.g.*, *United States* v. *Rosales-Lopez*, 617 F.2d 1349, 1356 (9th Cir. 1980); *United States ex rel. Moore* v. *People of Illinois*, 577 F.2d 411, 417 (7th Cir. 1978), cert. denied, 440 U.S. 919 (1979); *Martin* v. *Rose*, 525 F.2d 111, 113 (6th Cir. 1975); *United States* v. *Bamberger*, 482 F.2d 166, 168-169 (9th Cir.), cert. denied, 414 U.S. 1041 (1973); *United States* v. *Bueno*, 470 F.2d 154, 155 (5th Cir. 1972), cert. denied, 411 U.S. 949 (1973).

Of the many cases that petitioner cites (Pet. 14-19), only three refused to consider whether an erroneous failure to provide requested transcripts was harmless: *United States* v. *Jonas*, 540 F.2d 566, 572 (7th Cir. 1976); *People* v. *Sanchez*, 622 P.2d 604, 605 (Colo. Ct. App. 1980); and *People* v. *Hosner*, 15 Cal. 3d 60, 538 P.2d 1141, 1148, 123 Cal. Rptr. 381 (1975). Those three decisions, however, do not help petitioner. In later cases, both the Seventh Circuit and the Colorado Court of Appeals applied a harmless-error analysis to a failure to provide transcripts. See *United States ex rel. Moore* v. *People of Illinois*, 577 F.2d at 417; *People* v. *St. John*, 668 P.2d 988, 989 (Colo. Ct. App. 1983). And in *Hosner*, the Supreme Court of California held only that the failure to provide an indigent defendant with a transcript of his *own* previous trial cannot be harmless. Here, petitioner was provided with a full transcript of his own previous trial; he complains only about the failure to provide him with transcripts of the testimony from the first trial that was given *after* his case had been severed. Thus, the California court's decision in *Hosner* does not squarely conflict with the Ninth Circuit's analysis in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 88-73

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

BEN FARRELL KIRK,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

STATEMENT OF THE CASE

The Government's Brief in Opposition to the Petition for Writ of Certiorari, makes the following erroneous assertions of fact (Gov't Br. at page four). First, the Government asserts that after Petitioner Kirk was severed from the remaining co-defendants in the first

trial, two of the co-defendants testified in their own defense. In actuality, the minutes of the District Court for the case reflect that three of the co-defendants testified: James Quincy, Ross E. Moody and Lloyd Lindauer.[1]

While pursuant to a court order petitioner did receive Mr. Quincy's testimony, he did not receive the testimony of the other two co-defendants in which they successfully convinced the jury of their innocence of conspiring with petitioner and others.

The Government further claims on page four that, "The strategy of the remaining defendants at the first trial was to shift the blame for any offenses to petitioner;. . . ." This is not only speculation (one looks in vain for any citation to a transcript to

[1] This court may judicially note the district court clerk's record in this case (Fed.R.Evid. 201).

support this assertion), but highly unlikely.[2] Both Moody and Lindauer were company loan verification officers who worked as part of the sales group headed by Mr. Quincy. They worked at a time in which petitioner was an officer in the corporation but not an owner. The owners were in 1981 were Mr. Stern and Mr. Weiswasser. In order to be acquitted of the fraud and conspiracy charges, the two co-defendants would have had to have testified to their innocent activity as part of the sales effort of the company. They would have denied being part of any conspiracy in order to be acquitted. Since the evidence at petitioner's own trial showed that he was not in charge and did not steal a nickel from the organization or victims, the co-defendants hardly could have declared their innocence and blamed

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[2] The Court may not judicially note the Government's partisan characterization of the testimony of co-defendants Moody and Lindauer, transcripts of which were denied petitioner.

petitioner. In any event, this is rather cogent support for petitioner's motion that he at least receive a transcript of their testimony in order to determine whether their self-exculpatory testimony would also have exculpated petitioner.

The whole point of argument where an indigent has been denied a transcript is that without the transcript it is quite difficult to evaluate the precise utility of the evidence contained therein. However, given the fact that petitioner moved for this transcript, that the co-defendants testified that they were innocent of conspiracy, RICO, and assorted mail fraud charges, and that they were acquitted, it is a strong foundational basis for petitioner's motion for the transcripts.

Finally, since the Government appears to adopt the position of the court below that the failure to provide the transcripts was

harmless error beyond a reasonable doubt, petitioner points to the abundant evidence of the closeness of the case to refute such a contention. The petitioner's convictions stem from the fraudulent misrepresentations of the company sales staff to customers which the jury attributed to petitioner based on a conspiracy theory. The petitioner's defense was that the sales staff, or at least some of it, had its own agenda in making such representations against petitioner's wishes.

There was evidence petitioner tried to insure that the sales staff met the requirements of the law (e.g., RT 256, Exhibit 156, memo to staff re giving customers proper disclosure statements and rescission periods).

At petitioner's sentencing, the court noted that, "The real perpetrator of the fraud here, where the monies flowed in to this scheme, I place on the back of Mr. Quincy." (RT Dec. 8, 1986, p. 36).

The company was formed in 1979 and Mr. Quincy, as the prosecutor told the jury in opening argument in petitioner's case, was brought into the operation by the fall of 1980 (R.T. 26, 33). Prior to Quincy joining the operation, the "shortfall" of units to customers in the W.P.M.K. was only four units (R.T. 28, prosecutor quoting Walter Gribben). This figure bears no resemblance to the tremendous short-fall brought about with Mr. Quincy in charge of sales (estimated at 2,000 by June of 1981, R.T. 34; see Gov't Br. 2).

Company bookkeeper Lan Tran testified that petitioner was "boiling mad" about Quincy's sales tactics (R.T. Oct. 7, 1986, 215), and "very mad" at the buy-out of Mr. Quincy by which the company (then owned by Mssrs. Stern and Weiswasser) paid Quincy an exorbitant amount of money (id. at 216). The buy-out was Weiswasser's decision, who as the owner with Stern, had the sole authority to

make it.

W.P.M.K. part-owner H.W. McDowell (until Stern and Weiswasser purchased the company in late 1980) stated that prior to Stern-Weiswasser, petitioner was over-all director of the program but that when Quincy was there, petitioner "was not running the sales organization. . . ." (R.T. 148).

As evidence of who controlled the company funds, company bookkeeper Lupe Correa, testified it was policy not to send out checks when it was obvious there were insufficient funds to cover them (ibid.). She testified it was Mr. Stern who determined whether monies were sufficiently available to cover the checks because he supplied the money to make payments (id. at 30, 32).

There was also evidence that petitioner attempted to have the operations of W.P.M.K. run with the advice of knowledgeable counsel (R.T. Oct. 7, 1986, 199, 201, testimony of Lan

Tran). Further, after the take-over in January of 1981 by Stern and Weiswasser, petitioner was subordinated to Stern and Weiswasser and took orders from them in the operation of the company (id. at 204-6, 210, 213, 215). As Lan Tran testified, "They gave the orders" (id. at 206). Government witness Harold Sasaki testified that Mr. Kirk gave instructions, "At the direction of Mr. Stern and Mr. Weiswasser" (R.T. Oct. 2, 1986, 565). Witness Lupe Correa, also called by the prosecution, also testified that Stern was in charge and in his absence Mr. Weiswasser ran the business in 1981 (R.T. Oct. 7, 1986, p. 27).

These facts show two things: 1) petitioner's liability at trial was based solely on the conspiracy theory; 2) there was substantial evidence that he not only did not control the company during the bulk of the fraudulent representations to buyers, but that

he disagreed with those tactics. Had he been able to call Mssrs. Moody and Lindauer to testify favorably for him, he would have been acquitted. It must be recalled that the first jury to assess petitioner's guilt or innocence could not reach a verdict.

REASONS FOR ALLOWANCES OF THE WRIT

A. PETITIONER ARGUED TO THE COURT BELOW THAT UNDER THE FACTS OF THIS CASE AND UNDER BRITT V. NORTH CAROLINA, HIS CASE SHOULD BE REVERSED WITHOUT AN EVALUATION OF HARMLESS ERROR.

The Government contends that petitioner did not preserve his claim because in his Opening Brief to the Court of Appeal he cited a harmless error case of the Ninth Circuit (United States v. Rosales-Lopez, 617 F.2d 1349 (9th Cir. 1980), as a case setting forth the standard of review. While it is correct that in his Opening Brief he did erroneously cite Rosales-Lopez for this proposition, he thereafter certainly made it clear to the Court of Appeal that the Standard of Review

under Britt was reversal per se. First, he cited this Court's opinion in Britt as the fulcrum point for evaluating the error (Petitioner's C.A.Br. 11, 12, 15; Reply Br., 1, 2, 3). Further, he acknowledged the error in his Petition for Rehearing to the Court of Appeal by noting that he had at all times relied upon Britt in arguing for reversal per se in his Opening and Reply Briefs as well as at oral argument before the court:

> "Indeed, at the latter [oral argument], he answered Judge Goodwin's question, "You are arguing for a per se rule of reversal [for Britt error]" with an affirmative. The Court was concerned that such a rule (requiring transcripts to a severed defendant) would create pressures at the trial level not to grant severance." (Pet. Reh. Br. 3-4, n.1).

Thus, although petitioner did make one mistake in reference to the standard of review in his Opening Brief, he at all times argued Britt error required for a reversal per se once the two prongs of the Britt test are met.

He made the point crystal clear both at oral argument to the Court of Appeal as well as in his Petition for Rehearing.

The Government's response, "That this Court has never suggested that an error in failing to provide a defendant with transcripts cannot be harmless" (Gov't Br. 4) simply does not square with the Court's holding in **Britt v. North Carolina** as argued in our petition. If the transcript on a material witness was requested by the indigent and denied by the court (prong one),and if there was no adequate alternative to the transcript (prong two), reversal is required.

Petitioner cited the muddle of lower court authority throughout the nation on this issue. While respondent meritlessly asserts that there seems to be unanimity in applying a harmless error standard (Gov't Br. 4-5), in fact, a quick review of the cases cited by petitioner (pp. 15-16) reveals that the

majority of those cases refuse to even consider whether transcript error is harmless. Most classify the error as "plain" or "clear" or simply "error" without engaging in a harmless error analysis (see **Simmons v. Commonwealth**, 576 S.W.2d 253 (Ky., 1978); **State v. Rankin**, 295 S.E.2d 416 (N.C., 1982); **State v. Shute**, 122 N.H. 501, 446 A.2d 1162 (1982); **Graham v. State**, 624 S.W.2d 785 (Tex.App., 1981); **State v. Woodward**, 26 Wash.App. 735, 617 P.2d 1039 (1980).

To be sure, there is abundant authority also applying a harmless error analysis to Britt error within various states and federal circuits. Indeed, some jurisdictions are internally inconsistent and have applied both reversal per se and a harmless error standard (e.g., see Gov't Br. p. 5).

Given the vast number of criminal prosecutions of indigent defendants in this nation, this is an issue involving an

important constitutional right. The various jurisdictions are in disarray concerning the appropriate standard of review. The matter warrants this Court's review to resolve the question.

B. THE APPLICATION OF A HARMLESS ERROR STANDARD AS APPLIED IN PETITIONER'S CASE DENIES AN INDIGENT HIS RIGHT TO DUE PROCESS OF LAW AND IS INCOMPATIBLE WITH THIS COURT'S RULING IN BRITT V. NORTH CAROLINA.

As the Government notes in its Brief in Opposition, the Court of Appeal applied a harmless error standard in this case and by doing so avoided reaching "the delineation of Kirk's constitutional right to a free transcript" (Pet.App. 4441). The Court's resort to the harmless error standard in this case is a classic misapplication of the rule.

Petitioner's case was close enough in the eyes of a jury as to cause a deadlock during his second trial. The trial court recognized during the third trial that "there's no evidence that Mr. Kirk had any dealings, at

all, with these alleged victims [the time-share buyers who were defrauded]. . . ." (RT Oct. 8, 1986, p. 57). Given the additional evidence noted above in the statement of facts, this was not an overwhelming case. It was a case where the calling of the two witnesses, Moody and Lindauer, could have made the difference.[3]

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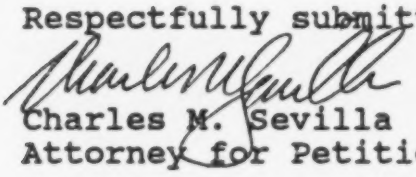
[3] Even if a harmless error standard applied, the Court of Appeal should have at least remanded the case to the federal district court to allow evidence on the issue of what Mr. Moody and Lindauer testified to at the first trial in which they were acquitted. If their testimony would have been exculpatory toward petitioner, there is no reasonable manner in which the error in denying petitioner the essential tools to defend himself could be deemed harmless beyond a reasonable doubt. For if their testimony were favorable to petitioner, petitioner was denied access to crucial evidence of two percipient witnesses to the non-existence of the conspiracy.

CONCLUSION

For the reasons in the petition in this Reply, a Writ of Certiorari should be granted.

Respectfully submitted,



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DATED: 15 September 1988